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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KENNETH R. MELTON,

Cross-Complainant and Appellant,

v.

FIRST WESTERN CORPORATION

et al.,

Cross-Defendants and Respondents.

G039877

(Super. Ct. Nos. 06CC12145 &
06CC12155)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Gray, Judge. Affirmed.

DLA Piper, Betty M. Shumener, Robert J. Odson, Henry H. Oh, Robert O. Barton and Bethany M. Palmer for Cross-Complainant and Appellant.

Prenovost, Normandin, Bergh & Dawe and Steven L. Bergh for Cross-Defendants and Respondents.

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Cross-complainant Kenneth R. Melton and Randall J. Friend were members of Eagle Real Estate Management Group, LLC (Eagle Management), which managed a real estate investment enterprise, Eagle Real Estate Group, LLC (Eagle Real Estate), specializing in using tax exempt bonds to finance the acquisition and renovation of large apartment complexes offering affordable housing units. The Eagle Management Operating Agreement (Management Agreement) required Friend to devote his full time and business efforts to Eagle Management and refrain from engaging in any other business that would require a substantial commitment of his time.

After several successful years of operating the business, Friend turned his attention to the creation of a new bank. Without Melton's permission, Friend ceased his efforts in Eagle Management to form cross-defendant First Western Corporation (First Western), which was the predecessor to cross-defendant Southern California National Bank (bank). Melton sued First Western and the bank, alleging causes of action for aiding and abetting breach of fiduciary duty, interference with contract, and interference with prospective economic advantage. Melton alleged First Western and the bank were vicariously liable for the acts of Friend and his associates in creating and operating respondent companies. The trial court sustained respondents' demurrers without leave to amend as to all of the causes of action and dismissed the complaint.

We conclude the trial court did not err. Melton could not rely on Friend's acts to establish First Western and the bank aided and abetted a breach of fiduciary duty because a corporate agent acting on behalf of a corporation cannot be held to act in concert with the corporation. (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 77 (*Janken*).) Similarly, Melton could not rely on Friend's acts to establish interference with contract. Because Friend cannot interfere with his own contract, respondents cannot be vicariously liable for the same tort based on Friend's acts. In addition, Melton cannot hold respondents vicariously liable for the acts of other

respondents because we have, in a separate appeal, affirmed summary judgment in favor of these members on the same causes of action.

Finally, we conclude the trial court did not err in sustaining demurrers without leave to amend as to Melton's claim for interference with prospective economic advantage. Melton failed to identify any noncontractual economic advantage lost due to respondents' actions. Accordingly, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

According to Melton's cross-complaint, in May 2000, Melton and Friend founded Eagle Management and Eagle Real Estate. Eagle Management's sole business was to manage Eagle Real Estate. Eagle Management and Eagle Real Estate specialized in utilizing tax exempt bond financing to acquire and renovate large apartment complexes that offered a certain percentage of affordable housing units. Under their business plan, Eagle Management identified large apartment projects for Eagle Real Estate to acquire and renovate, and then refinance or sell them for profit.

Eagle Management is governed by the Eagle Management Operating Agreement (Management Agreement), and Eagle Real Estate is governed by the Eagle Real Estate Group, LLC, Operating Agreement (Real Estate Agreement). Melton and Friend each owned a 45 percent interest in Eagle Management and H. Gordon MacKenzie, since 2003, owned the remaining 10 percent interest. Eagle Management owned a 73 percent interest in Eagle Real Estate, and respondents held nearly all of the remaining 27 percent interest.

As the exclusive manager of Eagle Real Estate, Eagle Management received acquisition fees, disposition fees, asset management fees, construction inspection, contract oversight and administration fees from each apartment property Eagle Real Estate acquired. As a member owning a 73 percent interest in Eagle Real

Estate, Eagle Management also received a pro rata share of distributions to Eagle Real Estate members. Each member of Eagle Management played a distinct role in the business. Friend was the Director of Acquisitions, responsible for locating property and investors. Melton specialized in handling the financial aspects associated with tax exempt bond financing, refinancing, management and sale of the projects. MacKenzie oversaw renovation of the projects.

Friend was the only member of Eagle Management in charge of acquisitions. Under the Operating Agreement, Friend promised he would devote his full time and business efforts to Eagle Management and refrain from engaging in any other business that would require a substantial commitment of his time. Specifically, section 5.7 of the Eagle Management Agreement provides: “The Members shall not engage in any other business activities requiring a substantial commitment of such Member’s time, and shall devote their full time and business efforts to Eagle Management.

Notwithstanding the Members agreement to devote their full time and commitment to Eagle Management, the Members are hereby expressly authorized to engage in the items set in section 5.9 below.”

Beginning in late 2005 or early 2006, Friend began devoting substantial time and energy to First Western and the bank, causing him to neglect his duties to Eagle Management and Eagle Real Estate. Friend’s active involvement with First Western and the bank was not an authorized activity under section 5.9 of the Management Agreement. Friend formed First Western, the ““pre-formation”” bank entity on June 16, 2006, following months of meetings and planning. Friend served as First Western’s director, chief executive officer, secretary, chief financial officer and registered agent, and controlled every aspect of First Western’s business. Because Friend devoted so much time to First Western and the successor bank, acquisitions for Eagle Real Estate came to a standstill.

In addition, Friend, acting as an officer and director of First Western, diverted Eagle Real Estate's resources to First Western and the bank. Specifically, Friend ran First Western out of Eagle's offices, holding weekly meetings there. Friend required Eagle Real Estate's staff to devote hundreds of hours to First Western, and diverted Eagle Real Estate funds and lease rights to First Western. In December 2006, Friend used Eagle Real Estate funds to purchase a computer for First Western, and in 2007, used Eagle Real Estate funds to pay First Western's rent. On July 25, 2007, the bank's articles of association and organization certificate were filed, establishing its corporate existence. Three days later, the bank ratified, approved and adopted all of the acts taken by the organizers of the bank.

A dispute arose between Melton, on the one hand, and Friend and MacKenzie, on the other, resulting in two lawsuits that were later consolidated into the present action. Melton filed a cross-complaint against First Western and the bank, alleging (1) aiding and abetting breach of fiduciary duty (third cause of action); (2) interference with contract (seventh cause of action); (3) interference with prospective economic advantage (eighth cause of action); and (4) successor liability (thirteenth cause of action). After allowing amendment, the trial court sustained respondents' demurrer to each of these causes of action without leave to amend. Melton now appeals the resulting judgment.

II

DISCUSSION

A. *The Trial Court Properly Sustained Respondents' Demurrer to Melton's Claim for Aiding and Abetting Breach of Fiduciary Duty*

Virtually all of the acts of First Western or the bank alleged in the complaint were performed by Friend. As noted above, the complaint alleges that Friend

served as First Western’s director, chief executive officer, secretary, chief financial officer and registered agent, and controlled every aspect of First Western’s business. This raises the question whether Friend’s acts constituting a breach of fiduciary duty to Eagle Management can be imputed to First Western and the bank. We conclude the answer is no.

“Aiding and abetting occurs when one helps another commit a prohibited act. [Citation.] The concept of aiding and abetting involves two separate persons, one helping the other.” (*Janken, supra*, 46 Cal.App.4th at p. 77.) But “[a] corporation can act only through its employees; thus, an employee acting on behalf of the employer cannot be acting in concert with the employer, as there is in law only a single actor.” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326 (*Fiol*).) As the court in *Janken* explained: “Conspiracy is a concept closely allied with aiding and abetting. A conspiracy generally requires agreement plus an overt act causing damage. [Citation.] Aiding and abetting requires not agreement, but simply assistance. The common basis for liability for both conspiracy and aiding and abetting, however, is concerted wrongful action. [Citations.] A corporate employee cannot conspire with his or her corporate employer; that would be tantamount to a person conspiring with himself. Thus when a corporate employee acts in his or her authorized capacity on behalf of his or her corporate employer, there can be no claim of conspiracy between the corporate employer and the corporate employee. [Citations.] In such a circumstance, the element of concert is missing. [¶] Similar reasoning applies to aiding and abetting.” (*Janken, supra*, 46 Cal.App.4th at p. 78.) Accordingly, First Western and the bank cannot be held liable under an aider and abettor theory based on Friend’s acts.¹

¹ Moreover, Melton could not amend the cross-complaint to state a cause of action for breach of fiduciary duty against First Western or the bank because neither owed Melton a fiduciary duty.

The cross-complaint, however, also alleges that other individuals named in the cross-complaint, Robert Zeltner, Wyn Holmes, Larry Ballard, and David Conant (bank cross-defendants) acted in concert with Friend and aided and abetted his breach of fiduciary duty. Because these individuals “were ‘organizers’ of the proposed bank, and employees or Directors of First Western and/or the proposed bank,” Melton asserts First Western and the bank should be held liable for their actions. The problem with this argument is that we have determined in a separate appeal arising from the same action, *Melton v. Ballard*, (Feb. 27, 2009, G040044) [nonpub. opn.], the trial court properly granted summary judgment to these individuals on Melton’s claims of aiding and abetting breach of fiduciary duty and breach of contract. We have determined the trial court properly granted summary judgment in favor of these individuals, therefore their alleged tortious acts are not tortious at all and provide no basis for vicarious liability against First Western or the bank. (See *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 574 [aider and abettor liability requires actual commission of a tort].) We therefore conclude any error by the trial court in sustaining the demurrer of First Western and the bank without leave to amend as to Melton’s aiding and abetting breach of fiduciary duty claim is harmless. (See *Teresi v. State of California* (1986) 180 Cal.App.3d 239, 245, fn. 4 [error in sustaining demurrer harmless where claim is legally untenable]; see also *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309.)

We also conclude there is no reasonable possibility Melton can cure the defects in his cross-complaint by amendment. Thus, the trial court did not abuse its discretion by sustaining the demurrer without leave to amend. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 133.)

B. *The Trial Court Properly Sustained Respondents' Demurrer to Melton's Claim for Interference with Contract*

The cross-complaint alleges that First Western and the bank interfered with Melton's contractual relationship with Friend. Again, Melton relies primarily on Friend's acts in support of this cause of action.

But a party may not be held liable for interfering with his or her own contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 514.) Because Friend cannot be liable for interference with contract, it follows that First Western and the bank cannot be held vicariously liable for interference with contract based on Friend's acts. Indeed, as we noted above, "[a] corporation can act only through its employees; thus . . . there is in law only a single actor." (*Fiol, supra*, 50 Cal.App.4th at p. 1326.) Accordingly, Melton may not rely on Friend's acts to establish liability for interference with contract against First Western or the bank.

Melton may also not seek to hold First Western or the bank vicariously liable for the acts of the bank cross-defendants. Again, we affirmed summary judgment in favor of these individuals on the very same cause of action in the *Melton v. Ballard* appeal. Accordingly, we do not disturb the trial court's ruling sustaining respondents' demurrer to Melton's interference cause of action.

C. *The Trial Court Properly Sustained Respondents' Demurrer to Melton's Claim for Interference with Prospective Economic Advantage*

We review de novo the trial court's order sustaining a demurrer. (*Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1263.) "In doing so, we assume the truth of all properly pleaded facts and consider any judicially noticed documents. [Citation.] We give the complaint a reasonable interpretation and determine whether it states facts sufficient to constitute a cause of action under any legal theory. [Citation.] We review denial of leave to amend for abuse of discretion. [Citation.]" (*Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 463.)

To state a cause of action for interference with prospective economic advantage, the pleader must allege “the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. This tort therefore ‘protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise.’” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1164.)

The cross-complaint’s cause of action for interference with prospective economic advantage does not expressly mention the acts pertaining to the creation of First Western or the bank, alleging only the acts of cross-defendants who are not part of this appeal. The cause of action, however, incorporates by reference all of the earlier allegations of the pleading, which include allegations that Friend’s attention was diverted away from finding acquisitions for Eagle Real Estate because of his activities in connection with First Western and the bank.

The cross-complaint, however, is ambiguous in identifying the third party with whom Melton had an economic relationship. If the third party is Eagle Management or Eagle Real Estate, the relationship is contractual, making this cause of action superfluous. If the third parties are sellers of apartment complexes, then Melton has failed to plead the cause of action with requisite specificity because he failed to identify any of these sellers. Thus, the cross-complaint merely alleges a “‘speculative expectation that a potentially beneficial relationship will arise.’” (See *Korea Supply Co.*, *supra*, 29 Cal.4th at p. 1164.) We conclude this is insufficient to state a cause of action for interference with prospective economic advantage.

III

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs of this appeal.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.